MIAMI REVIEW — MIAMI, FLORIDA

in the

Supreme Court

of the

United States

OCTOBER TERM, 1975

NO. 75-6527

JAMES INGRAHAM, et al.,

Petitioners

vs.

WILLIE J. WRIGHT, I, et al.

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE CASE

Petitioners' statement of the case is adequate, although heavily larded with extracts of testimony designed to suggest that the two individual students who brought the action were subjected to some sort of hair-raising brutality. We merely point out that the District Judge who tried the case and heard the testimony, and who *assumed* that the Eighth Amendment could apply to corporal punishment in public schools, concluded that no jury could lawfully find any deprivation of constitutional rights, and dismissed the students' actions without requiring evidence from the defendants.

ARGUMENT

REASONS FOR DENYING THE WRIT

1. The Substantive Due Process Issue

The *en banc* decision of the Court of Appeals held that corporal punishment, both in concept and as regulated by the written policy of the Dade County School Board, is not arbitrary or capricious, and is reasonably related to the legitimate object of maintaining order and discipline in the public schools. No court has held otherwise on this issue — even the earlier panel decision of the Fifth Circuit in this case refused to adopt petitioners' view, urged below, that corporal punishment is "unrelated to the achievement of any legitimate educational purpose," *See Ingraham v, Wright*, 498 F.2d 248, 269 (5th Cir. 1974).

Petitioners make no claim that the decision below presents a conflict of authority, but now for the first time

suggest that a standard of "strict scrutiny" be imposed so as to require a showing of a compelling state interest in the utilization of corporal punishment as a disciplinary alternative by school officials. No court has ever so held, and the cases cited by petitioners do not support their theory. *Skinner v. Oklahoma*, 316 U.S. 535(1942), was decided under the *equal protection* clause of the Fourteenth Amendment, not the due process clause, and dealt with a discriminatory sterilization statute. The other three cases offered by petitioners all dealt with legislative enactments which were found by the Court to invade "fundamental personal liberties" secured by the Constitution. *Griswold v. Connecticut*, 381 U.S. 479, 495(1965) (marital privacy); *Bates v. City of Little Rock*, 361 U.S. 516, 522(1960) (peaceable assembly); *Shelton v. Tucker*, 364 U.S. 479, 486(1960) (free association).

No legislative enactment is in issue here, and it can hardly be argued that students enjoy a fundamental personal liberty to attend public schools immune from the possibility of paddling for misbehavior.

The issue narrows, then, to whether or not specific instances of excessive corporal punishment are remediable in federal courts as Fourteenth Amentment violations. Again no court has so held, and as the *en banc* court below observed:

> "Certainly the guidelines set down in policy 5144 establishes standards which tend to eliminate arbitrary or capricious elements in any decisions to punish. Having determined that corporal punishment itself and corporal punishment as circumscribed by the guidelines in Policy 5144

is not arbitrary, capricious, or unrelated to legitimate educational goals, we refused to look at each individual instance of punishment to determine if it has been administered arbitrarily or capriciously. We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks. We note again the possibility of a civil or criminal action in state court against a teacher who has excessively punished a child."

Ingraham v. Wright, 525 F.2d 909, 917 (5th Cir. 1976)

The point we make here is underscored by the Court's very recent decision in *Paul v. Davis*, 44 LW 4337(1976), in which the opinion makes clear that the due process clause of the Fourteenth Amendment does *not* provide, through the vehicle of 42 U.S.C. sec. 1983, a federal cause of action for any and all wrongs by government employees which have heretofore been thought to give rise only to state law tort claims. The individual petitioners, and other students who claim to have suffered unreasonable punishment, have perfectly adequate remedies under state law. There is no clear call for this Court to create a new federal tort.

2. The Procedural Due Process Issue

The "Question Presented for Review" on this point by petitioners contains an internal paradox, and distorts

the issue. Paraphrased, the question posed by petitioners is whether the infliction of *severe* corporal punishment must be preceded by due process procedural steps mandated by the Fourteenth Amendment. Obviously enough, petitioners would not concede (nor would we) the converse proposition — that preliminary procedural steps would legitimize the subsequent application of *severe* corporal punishment. A rule of constitutional law which only required notice, a hearing, and other preliminaries as a prelude to *excessive* punishment would be ridiculous on its face.

The true issue, then, is whether the Fourteenth Amendment mandates preliminary procedural requirements before *any* corporal punishment may be administered to public school students. The *en banc* court below held that it does not.

Petitioners attempt to argue that the *en banc* decision presents this Court with conflicts of authority on this issue, as a basis for jurisdiction by writ of certiorari. It does not. No other court of appeals has rendered a contrary decision. With the sole exception of *Baker v. Owen*, 395 F.Supp. 294(M.D.N.C.1975), *aff'd* ____ U.S. ____, 96 S.Ct. 210(1975), no federal district court has found procedural due process requirements to be necessary as a prerequisite to corporal punishment by school administrators. This Court's affirmance in that case, as pointed out by the Fifth Circuit in its decision below, did not constitute a ruling on this issue, which was not before the Court. *See Ingraham v. Wright*, 525 F.2d 909, 918(5th Cir.1976).

Petitioners' argument is thus reduced to reliance upon *Goss v. Lopez*, 419 U.S. 565(1975), either as providing a conflict with the decision below, or as suggesting that due process machinery as an inevitable fixture in connection with corporal punishment is a question of such magnitude that it demands resolution by the Court.

There is no direct conflict with *Goss*, of course, since that decision dealt with suspensions of students from school. Furthermore, that very difference in the nature of the penalties involved — removal from the educational process by suspension, as opposed to temporary bodily discomfort while *remaining* in the educational process by paddling — serves to illustrate the inapplicability of *Goss*, and the wisdom of the court below.

This Court in *Goss* found suspension to be a deprivation of a substantial property interest (education) conferred by the state of Ohio, with consequential effects upon the student's employment prospects and reputation. In contrast, the very purpose of corporal punishment as a disciplinary measure is to avoid exclusion of the student from his studies. He suffers no property loss, and his interest in being free from pain in the posterior, while real enough to the misbehaving student, has no realistic implications for his future employment or standing in the community.

The true basis of *Goss v. Lopez* was illuminated by this Court's decision in *Paul v. Davis*, *supra*. The Court there holds that for a federal cause of action to arise under 42 U.S.C. sec. 1983, there must be a deprivation of a *right*, secured either by state law or the Constitution, not merely an incident of tortious conduct by a state employee. Neither the law of Florida nor the Fourteenth Amend-

ment can be said to guarantee a public school student the right to attend school free of physical discomfort as punishment for misconduct. If the punishment is severe the student has a civil remedy in the state court, but he has no interest of constitutional proportions which would justify the mechanics of procedural due process prior to any paddling of whatever sort, for whatever offense.

Procedural due process requirements in the context of public education obviously must have a stopping point, if the federal courts are not to become overseers of all educational decisions which in one way or another might be perceived by students, or parents, as undesirable. The *en banc* decision below correctly draws the line at corporal punishment, and it is unnecessary for this Court to deal with the matter.

3. The Cruel and Unusual Punishment Issue

The *en banc* court below, after careful analysis of the historic purpose and judicial interpretation of the Eighth Amendment, held squarely that it should not and does not apply to the disciplinary use of corporal punishment in public schools.

As the court below points out, only one case, *Bramlet v. Wilson*, 495 F.2d 714(8th Cir.1974), has held to the contrary, although a few district court decisions have assumed the applicability of the Eighth Amendment to school discipline, without really examining the problem. *See Ingraham v. Wright*, 525 F.2d 909, 913 (5th Cir.1976) (footnote 3). An examination of those cases, and particularly of *Bramlet v. Wilson*, *supra*, quickly discloses that the treatment of the Eighth Amendment question has been

superficial, at best, and demonstrates that only the *en banc* Court of Appeals for the Fifth Circuit has really given the issue thorough research and analysis.

Petitioners rely upon *Bramlet v. Wilson*, *supra*, as creating a conflict among courts of appeal sufficient to induce this Court to take jurisdiction. The apparent conflict is insubstantial, and by no means demands this Court's attention. In the first place, the Eighth Circuit in *Bramlet* was dealing only with the face of a complaint dismissed below, and simply reversed, following the orthodox rule that prohibits dismissal where a plaintiff might prove some possible set of facts which would entitle him to relief. In contrast, the Fifth Circuit in this case was reviewing a full-blown record of proceedings below, including a week-long trial. Secondly, *Bramlet* was decided by only two judges of the Eighth Circuit, with the Chief Judge dissenting. The present case was decided by the Fifth Circuit sitting *en banc*, on rehearing after the initial panel decision, with all but three judges concurring in the decision with respect to the Eighth Amendment. Finally, the opinion in *Bramlet* makes no analysis whatever of the history, intent or interpretation of the Eighth Amendment, as does the *en banc* court below.

Indeed, the court in *Bramlet* appears to rest its conclusion only upon cases involving corporal punishment administered to adult prisoners, *Jackson v. Bishop*, 404 F.2d 571(8th Cir.1968), and to juvenile offenders in a state correctional institution, *Nelson v. Heyne*, 491 F.2d 352 (7th Cir.1974). As the court below pointedly observed, prisons and public schools are not analogous for the purpose of Eighth Amendment scrutiny. Corporal punishment to prisoners, adult or juvenile, is easily seen as cruel

and unusual, since the prisoners have already been deprived of their liberty, and no rational purpose is served by inflicting pain, rather than utilizing other means of correction, such as isolating those guilty of misbehavior. Punishment to prisoners is clearly an extension of the original criminal sanction of confinement. Abuse is much more likely, given the seclusion of prisoners from their families and from public scrutiny.

None of these considerations apply in the case of public school students, and so the *Bramlet* decision is unpersuasive and unsupported as viable precedent. It is not likely to be followed, or even adhered to by the Eighth Circuit, in the wake of the comprehensive decision of the *en banc* court in the present case.

The remaining question is whether this aspect of the case presents such an important issue of federal law as to require settlement by this Court. As a matter of interest, we note that the Court has once refused to review a case involving corporal punishment in public schools, in which the applicability of the Eighth Amendment was in issue. *Ware v. Estes*, 328 F.Supp. 657 (N.D.Tex.1971), *aff'd per curiam* 458 F.2d 1360(5th Cir.1972), *cert. den.*409 U.S. 1027(1972).

Judging from the very few cases on the point which have arisen in the entire country, it is difficult to perceive a burning need for a constitutional pronouncement from this Court, at the expense of other truly critical problems which crowd the docket and compete for the Court's consideration.

Finally, we advert again to this Court's very recent views in *Paul v. Davis, supra.* The extension of the Eighth Amendment to permit a federal action under 42 U.S.C. sec. 1983 by any school student who alleged harm through corporal punishment would be a classic example of the premise explicitly rejected by the Court in *Paul v. Davis* — that the Fourteenth Amendment and sec. 1983 make actionable ". . . wrongs inflicted by government employees which had heretofore been thought to give rise only to state law tort claims." The *en banc* decision of the Fifth Circuit in this case made precisely the same point in these words (525 F.2d 909 at 915):

> "We do not mean to imply by our holding that we condone child abuse either in the home or the schools. We abhor any exercise of discipline which could result in serious or permanent injury to the child. Indeed, if the force used by defendant teachers in disciplining plaintiff was as severe as plaintiffs allege, a Florida state court could find defendants civilly and criminally liable for tortious conduct exceeding the level of severity authorized by 232.27 Fla. Stat.Ann. and by Dade County School Board policy 5144. The basis of such actions is, however, tort and criminal law, *not* federal constitutional law. We find it neither proper nor necessary to expand the Eighth Amendment beyond its intended and reasonable scope to encompass an action which is essentially based on the commission of a battery."

CONCLUSION

The Court of Appeals for the Fifth Circuit first introduced the Constitution to the campus, and has never been slow to recognize and articulate the essential rights of students within the context of public educational institutions. *See generally* Wright, *The Constitution on the Campus*, 22 Vanderbilt L.Rev.1027(1969). Now that court, sitting *en banc*, has clearly and carefully drawn the line and refused to read into the Constitution new and inappropriate and unnecessary avenues for fresh traffic in federal litigation over incidents of corporal punishment in the schools.

By any realistic appraisal, the time-honored and almost universal use of moderate corporal punishment as a prompt disciplinary measure in public schools is a rational alternative to more drastic exclusionary devices. The Fourteenth Amendment does not command, nor does experience suggest, the necessity that federal courts must lay down formal due process procedures to satisfy the emotional notion that the transitory discomfort of a paddling somehow deprives a school child of a constitutional right.

Punishments will occasionally exceed moderate proportions, but it does not follow that these incidents must reach constitutional proportions. Adequate state remedies are available, and the Eighth Amendment should not be warped from its true intent and meaning. If it applies to give a federal remedy to a child spanked in school, it should equally apply to a citizen who suffers a punch in the nose from a policeman, and the further development of "federal tort law" would benefit immensely.

No conflict of authority is presented in this case with respect to the due process issues, and the single contrary appellate decision on the Eighth Amendment issue is thin, ill-considered and of no substantial precedential value. The *en banc* decision below is comprehensive and correct, and petitioners have failed to show why this Court should disturb it. The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari have been served upon all parties required to be served, service having been effected by mail, in accordance with paragraph 1 of Rule 33 of the Rules of the Supreme Court of the United States, to the following named attorneys of record, on the _____ day of May, 1976.

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